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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

TONY STOKES,)	
)	
Petitioner-Appellant,)	NO. 37915
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE RONALD J. WILPER
District Judge

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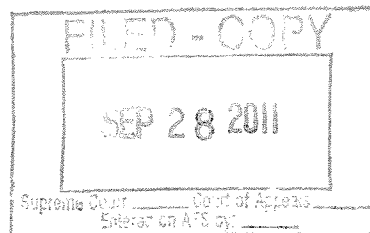


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STATEMENT OF THE CASE

Nature Of The Case

Tony Ray Stokes appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The underlying facts and course of proceedings are set forth in State v. Stokes, Docket No. 33337, 2008 Unpublished Opinion No. 425 (Idaho App., April 11, 2008):

Tony Ray Stokes was indicted by a grand jury on one count of lewd conduct with a minor under sixteen and two counts of sexual abuse of a child under sixteen. Pursuant to a plea agreement, Stokes pled guilty to sexual abuse of a child under sixteen, I.C. § 18-1506, and was sentenced to a unified term of fifteen years with three years determinate. Stokes filed an Idaho Criminal Rule 35 motion for reduction of sentence, which the district court denied. Stokes appealed from his judgment of conviction and from the denial of his Rule 35 motion contending that the district [court] abused its discretion by imposing an excessive sentence and by denying his Rule 35 motion. While his case was pending on appeal, the state filed a motion for remand and statement in support thereof in order for Stokes to be re-sentenced before a different judge. The Idaho Supreme Court granted the motion and the case was remanded. The district court issued an amended judgment of conviction and Stokes again was sentenced to a unified term of fifteen years with three years determinate. Stokes filed a Rule 35 motion for reduction of sentence, which the district court denied and Stokes again appeal[ed] from his judgment of conviction and the denial of his Rule 35 motion.

The Court of Appeals affirmed Stokes' judgment of conviction and sentence. Id.

Stokes filed a petition and affidavit for post-conviction relief. (R., pp. 5-12.) In his petition, Stokes alleged seven different grounds for relief: 1) that the court and his defense counsel failed to investigate potential mental health issues;

2) that the court failed to send Stokes to mental health court; 3) that the court failed to lower his bail so that he could be an inmate worker and, because of this, he did not get the exercise that he needed for an ankle sprain and was wheelchair bound; 4) that his attorney was ineffective for not informing him that he did not need to participate in the PSI or SANE evaluation; 5) that the court did not inform Stokes that he could have his attorney present while submitting to his PSI and SANE evaluation; 6) that the prosecution called Stokes “more or less” a “leach” and a “bad person;” and 7) that the district court failed to consider that Stokes was a first time offender and should have been sentenced more leniently. (Id.) His affidavit mimicked his claims. (R., pp. 15-16.) The district court granted his motion for appointment of counsel. (R., pp. 23-27.)

Stokes, through counsel, filed an amended petition for post-conviction relief. (R., pp. 39-42.) The amended petition did not incorporate the claims originally asserted by Stokes but rather presented two new claims. (Id.) In his first claim, Stokes alleged:

6. The Petitioner is being held illegally in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 2 and Section 13 of the Idaho Constitution and was not adequately represented at sentencing because his attorney did not request a psychological evaluation pursuant to ICR 32 and I.C. 19-2522(1) prior to sentencing despite the fact that the defendant had a significant history of depression, post-traumatic stress disorder, and was suicidal during the pendency of the proceedings.

7. That the court was aware of the Petitioner's mental illness history from information contained in the presentence report but did not order a psychological evaluation even though the Petitioner's past record was clean and the Petitioner's mental illness may have contributed to the conduct alleged to have occurred in the instant case.

(R., p. 40.) In his second claim, Stokes alleged:

8. The Petitioner alleges that his plea of guilty in the above entitled case was a product of coercive plea bargain tactics employed by the State. The Petitioner alleges that the State told the Petitioner through his attorney that if he went to trial that the State would ask for fifteen years to life. That the State of Idaho knew the victim had recanted her statement as to sexual abuse by the Petitioner. That the Petitioner felt threatened and without any choice but to accept a plea bargain even though he had no prior record and was an appropriate candidate for probation.

9. The Petitioner advised the court of the State's conduct prior to entry of plea but the court did not question the Petitioner about whether he wished to withdraw his guilty plea prior to sentencing.

(R., pp. 40-41.)

The state filed an answer to the amended petition. (R., pp. 43-45.) It also filed a motion for summary disposition and attached a supporting brief. (R., pp. 46-61.) In its supporting brief, the state asserted that Stokes' claims – specifically his claim concerning the district court's alleged failure to order a psychological evaluation, his claim alleging prosecutorial misconduct in the State's plea bargain tactics, and his claim regarding the district court's failure to ask Stokes if he wanted to withdraw his plea - failed to raise a genuine issue of material fact and were forfeited by Stokes' failure to raise them on appeal. (R., pp. 55-60.) The state also asserted that the claim related to ineffective assistance of counsel for Stokes' counsel's failure to request a psychological evaluation did not raise a genuine issue of material fact because Stokes failed to allege what the psychological report would have shown and how that it would have affected his case. (R., p. 60.)

Approximately one month later, a hearing was held on the state's motion for summary disposition. (See Tr..) At that hearing, Stokes' attorney specifically abandoned the claims that the prosecutor committed misconduct in its plea bargaining tactics and that the district court erred in failing to ask Stokes if he wanted to withdraw his guilty plea prior to sentencing, and only argued that Stokes should have received a psychological evaluation. (Tr., p. 14, L. 11 – p. 22, L. 20.)

One month later, the district court entered an order granting the state's motion for summary disposition and dismissing Stokes' amended petition for post-conviction relief. (R., pp. 62-69.) In its order, the district court noted that all claims raised in the initial Petition but abandoned in the Amended Petition were dismissed. (R., p. 65.) It dismissed Stokes' claim regarding ineffective assistance of counsel because Stokes failed to articulate what the report would have shown and failed to show that his attorney's actions fell below an objective standard of reasonableness. (R., p. 66.) It dismissed the remaining claims because they should have been brought on direct appeal and Stokes failed to present any information about why the claims could not have been brought on direct appeal. (R., pp. 66-69.) Stokes timely appealed. (R., pp. 72-74.)

ISSUES

Stokes states the issues on appeal as:

1. Actual Innocence.
2. U.P.C.P.A., Amend 6., Violation of Confrontation Clause.
3. U.P.C.P.A. Respondents waived defences [sic].
4. Cause and Prejudice, hindered or chilled redress.
5. U.P.C.P.A. Raised genuine issues requiring evidentiary hearing.
6. (Above 1. – 5., etc:) The Court did not issue a Notice of Intent to Dismiss, and give an opportunity to correct U.P.C.P.A. errors.

(Appellant's brief, pp. 3-4.)

The State restates the issue as:

Has Stokes failed to show that the district court erred in dismissing his petition without an evidentiary hearing?

ARGUMENT

Stokes Has Failed To Show That The District Court Erred In Dismissing His Petition For Post-Conviction Relief

A. Introduction

Stokes apparently contends that the district court erred by failing to issue of notice of intent to dismiss prior to dismissing his petition and that he raised a genuine issue of material fact in his claims and was entitled to an evidentiary hearing. (See Appellant's Brief.) Stokes has failed to show error. As an initial matter, because Stokes has failed to state appellate issues or support his argument with citations to the law or the record, this Court should decline to consider his appeal. Further, because the district court was not required to issue a notice of intent to dismiss prior to dismissing his petition on the state's motion, Stokes has failed to show error. Finally, Stokes has failed to show that he was entitled to an evidentiary hearing on his petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court's Order Summarily Dismissing Stokes' Petition For Post-Conviction Relief Is Unchallenged On Appeal

Failure to include an actual issue regarding summary disposition in the statement of issues as required by Idaho Appellate Rule 35(a)(4) eliminates the issue for consideration in the appeal. State v. Prestwich, 116 Idaho 959, 961, 783 P.2d 298, 300 (1989), overruled on other grounds in State v. Guzman, 122 Idaho 981, 842 P.3d 660 (1992); Kugler v. Drown, 119 Idaho 687, 691, 809 P.2d 1166, 1170 (Ct. App. 1991); State v. Crawford, 104 Idaho 840, 841, 663 P.2d 1142, 1143 (Ct. App. 1983) (it is implicit in the rule that the appellate court will not search the trial record for unspecified errors). On appeal, Stokes does not raise the issue of, or challenge, the district court's application of law to the factual allegations enumerated in his Amended Petition, and does not support his allegations with relevant authority or legal argument.

While Stokes lists allegations in his brief (Appellant's brief, pp. 3-4), Idaho Appellate Rule 35(a)(4) requires that Stokes' brief contain a statement of the issues presented for review, not mere allegations. Stokes does not raise an actual issue regarding the district court's order granting summary disposition, and never cites to the decision, the record, or the transcript, but rather simply alleges new purported wrongdoings on the part of his counsel. Stokes' failure to include any actual issue regarding summary disposition in the statement of issues as required by subdivision (a)(4) of Rule 35 eliminates the consideration of his appeal.

The rule requiring a statement of the issues might be relaxed where the issue was addressed by the authority cited or arguments contained in the

appellant's brief. Prestwich, 116 Idaho at 961, 783 P.2d at 300. Relaxing the rule requiring an actual statement of the issues regarding summary dismissal is not warranted in this case. Stokes does not cite to a portion of the record or transcript where the district court misapplied this law, or make a claim that the district court misapplied this law to the facts of his case.

Where an appellant fails to adequately raise issues for consideration, the proper remedy is to dismiss the appeal. See State v. Justice, 122 Idaho 407, 408, 834 P.2d 1323, 1324 (Ct. App. 1992) (appeal dismissed because no issues were raised regarding the order of the district court from which a timely appeal was taken); cf. I.A.R. 32(a). Stokes' appeal should be dismissed for failure to raise an issue for consideration.

Additionally, this court should not consider Stokes' claims on appeal because he does not cite to relevant legal authority or support his claims with legal argument or a citation to the record or transcript. An appellate court will not reach issues unsupported by citation to relevant legal authority or argument. State v. Zichko, 129 Idaho 259, 923 P.3d 966 (1996) (when issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered); see also I.A.R. 35. While Stokes cites several cases and statutes, these authorities are not relevant to whether the district court erred in summarily dismissing his Amended Petition, and Stokes does not argue that the district court misapplied relevant authorities to the facts of his case. Further, Stokes never points to an error in the record or transcript. Therefore this court should decline to consider Stokes' appeal.

D. Stokes' Claim Numbers 1-4 Are Being Raised For The First Time On Appeal, And Should Not Be Considered By This Court

Stokes raises four claims for the first time on appeal: 1) an actual innocence claim; 2) a violation of the confrontation cause claim; 3) a claim titled "U.P.C.P.A. Respondents waived defences [sic];" and 4) a claim titled "Cause and Prejudice, hindered or chilled redress." (Appellant's brief, pp. 3-4.) It is well settled that issues not raised below will generally not be considered for the first time on appeal. State v. Averett, 142 Idaho 879, 888-89, 136 P.3d 350, 359-60 (Ct. App. 2006); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). It is also well settled "that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." State v. Huntsman, 146 Idaho 580, 585, 199 P.3d 155, 160 (Ct. App. 2008); State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994) (citing State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993); Dunlick, Inc. v. Utah-Idaho Concrete Pipe Co., 77 Idaho 499, 502, 295 P.2d 700, 702 (1956)). Although Stokes asks this Court to consider these claims, a review of the applicable law and of the record shows that these issues were neither raised to nor decided by the district court. For this reason, Stokes' arguments are not properly before this Court on appeal.

E. Stokes Has Failed To Show That The District Court Erred In Dismissing His Amended Petition Without Issuing A Notice Of Intent To Dismiss

On appeal, Stokes asserts that the district court failed to issue a notice of intent to dismiss prior to dismissing his petition. (Appellant's brief, p. 6.) Idaho Code Sections 19-4906(b) and (c) provide that notice must be given to an

applicant prior to summary dismissal of an application for post-conviction relief. The notice procedures contained in I.C. § 19-4906(b) and (c) provide an applicant an opportunity to respond to a motion for summary dismissal and to establish a material issue of fact if one exists. Flores v. State, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and 20 days for the applicant to respond. Pursuant to I.C. § 19-4906(c), the district court may dismiss an applicant's post-conviction claims on the motion of either party. If the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. Martinez v. State, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). The reason that subsection (b), but not subsection (c), requires a 20-day notice by the court of intent to dismiss is that, under subsection (c), the "motion itself serves as notice that summary dismissal is being sought." Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). Here, because the district court ultimately dismissed Stokes' claims on the same grounds as the grounds raised in the state's motion for summary dismissal, it was not required to issue a notice of intent to dismiss prior to dismissing his petition. (Compare R., pp. 48-60 (Brief In Support Of Motion For Summary Disposition Of Amended Petition Without Evidentiary Hearing) with R., pp. 62-69 (Order Granting Motion For Summary Disposition Of Petition For Post-Conviction

Relief).) Thus, the district court did not err in dismissing Stokes' petition without issuing a notice of intent to dismiss.

F. Stokes Failed To Establish That He Was Entitled To An Evidentiary Hearing On His Amended Petition

Stokes asserts that he was "denied the right to bring his genuine issues of his U.P.C.P.A. to an evidentiary hearing." (Appellant's brief, p. 10.) Stokes, however, has failed to show error. The district court dismissed Stokes' claim regarding ineffective assistance of counsel because Stokes failed to articulate what a psychological evaluation would have shown and failed to show that his attorney's actions fell below an objective standard of reasonableness. (R., p. 66.) It dismissed his other claims (the district court's alleged failure to order a psychological evaluation, his claim alleging prosecutorial misconduct in the State's plea bargain tactics, and his claim regarding the district court's failure to ask Stokes if he wanted to withdraw his plea) because they should have been brought on direct appeal and Stokes failed to present any information about why the claims could not have been brought on direct appeal. (R., pp. 66-69.) The district court was correct in its rulings.

1. Stokes Failed To Show That His Counsel's Performance Was Constitutionally Ineffective

A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d

1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)).

To establish deficient performance the petitioner must overcome a strong presumption that counsel performed within the wide range of professional assistance by proving trial counsel's actions fell below an objective standard of reasonableness. State v. Shackelford, 150 Idaho 355, ___, 247 P.3d 582, 609 (2010); Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To meet this burden "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

The district court utilized these standards in analyzing Stokes' claim that his attorney was ineffective for failing to request a psychological evaluation prior to sentencing. (R., pp. 65-66.) In denying this claim, the district court concluded:

The Court finds that Petitioner has failed to articulate what a psychological report would have shown that would have altered the sentencing in this case. Further, the Court finds that Petitioner has failed to allege what the report would have shown which was not already contained in the VA hospital records before the Court. Finally, the Court finds that Petitioner has not established that the failure to request a psychological evaluation given the amount of information already in the record falls below an objective standard of reasonableness.

(R., p. 66.)

A review of the record shows that the district court was correct. Stokes' amended petition simply alleged that his attorney was ineffective for failing to request a psychological evaluation prior to sentencing "despite the fact that the defendant had a significant history of depression, post-traumatic stress disorder, and was suicidal during the pendency of the proceedings." (R., p. 40.) Nowhere in the amended petition did Stokes articulate what the psychological report would have found, how his attorney was deficient for failing to request one, or how his failure to obtain an evaluation prejudiced him. (See R., pp. 39-41.) Because Stokes failed to meet his burden of establishing a prima facie case of ineffective assistance of counsel, he has failed to show that the district court erred in denying his petition on this ground.

2. The District Court Did Not Err In Dismissing Stokes' Remaining Claims In His Amended Petition Because They Should Have Been Raised On Direct Appeal

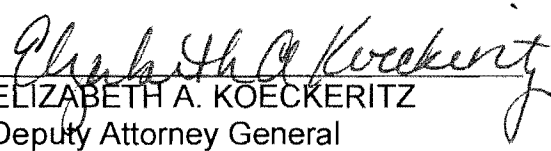
The district court dismissed Stokes' claim concerning the district court's alleged failure to order a psychological evaluation, his claim alleging prosecutorial misconduct in the State's plea bargain tactics, and his claim regarding the district court's failure to ask Stokes if he wanted to withdraw his plea for the reason that these claims should have been brought on direct appeal and Stokes failed to present any information about why the claims could not have been brought on direct appeal. (R., pp. 66-69.) The district court was correct in its ruling. "Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings...."

I.C. § 19-4901(b). Stokes failed to allege, let alone show, why the issues could not have been raised on direct appeal. (See, R., pp. 39-41.) On appeal, he continues to fail to show why the issues could not have been raised on direct appeal. (See Appellant's Brief.) Thus, he has failed to show that the district court erred in dismissing the claims on this basis.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Tony Ray Stokes' petition for post-conviction relief.


DATED this 28th day of September 2011.


ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of September 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

TONY RAY STOKES
IDOC # 82602
ICSI Medical Annex #54A
PO Box 14
Boise, ID 83707


ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm

